



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a partial Buy America waiver is appropriate for the purchase of 79 electric sedans and 11 electric vans in Alameda County, California. The partial waiver will permit the purchase of these vehicles so long as the final assembly occurs in the United States.

DATES: The effective date of the waiver is [insert date one day after publication in Federal Register].

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366-1562, or via e-mail at gerald.yakowenko@dot.gov. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366-4928, or via e-mail at michael.harkins@dot.gov. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated into a Federal-aid highway construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when the relevant domestic steel and iron products are not produced in the United States in sufficient and reasonable available quantities and of a satisfactory quality. This notice provides information regarding the FHWA's finding that a partial Buy America waiver is appropriate for the purchase of 79 electric sedans and 11 electric vans in Alameda County, California.

In accordance with Division A, section 123 of the "Consolidated Appropriations Act, 2010" (Pub. L. 111-117), the FHWA published a notice of intent to issue a waiver on its Web site for 79 electric sedans (Nissan Leafs) and 11 electric vans (Ford Transit Connects) (<http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=57>) on May 12th. The FHWA received 33 comments in response to the publication. Of these comments, 7 commenters objected to the proposed waiver on the grounds that Federal funds should be used to simply buy American products; 19 comments objected to Alameda County's intent to buy the Nissan Leaf, which is made in Japan, when there are electric vehicles, such as the Chevy Volt, that are made in America; 4 comments were from Alameda County responding to the concerns expressed in the comments; 1 comment supported the waiver because the Leaf is a better electric vehicle than the Volt; 1 comment supported the waiver because Nissan intends to manufacture the Leaf in Tennessee in the future; one comment supports the purchase of all electric vehicles; and one comment did not contain any message.

In general, Alameda County explained that there are no vehicles on the market that currently meet the FHWA's Buy America standard, which is 100 percent domestic steel and iron content. Alameda County further explained that the Chevy Volt does not meet their requirements because the Volt has only a 40-mile range when fully charged and then reverts to gasoline. Alameda County also explained that it needs to purchase all electric vehicles in order to achieve the best overall reduction in greenhouse gas emissions and particulate matter associated with those emissions since the San Francisco Bay Area is currently a nonattainment area for particulate matter.

The FHWA has considered Alameda County's assertion that its needs for this project require an all electric vehicle and that no vehicle on the market currently satisfies a 100 percent domestic iron and steel content requirement. The FHWA has also considered the comments stating that Federal funds should be used to purchase a vehicle that is made in the United States. In considering these comments, the FHWA has reevaluated the applicability of the Buy America requirement as it may apply to the purchase of vehicles. The FHWA's Buy America requirement was initially established in 1983 when the purchase of vehicles was not eligible for assistance under the Federal-aid Highway Program. As such, the FHWA's Buy America requirements were tailored to the types of products that are typically used in highway construction, which generally meet a 100 percent domestic steel and iron content requirement.

Vehicles, however, are not the types of products that were initially envisioned as being purchased with Federal-aid highway funds when Buy America was first enacted. In today's global industry, vehicles are assembled with components that are made all over

the world. The FHWA is not aware of any vehicle on the market that can claim to incorporate 100 percent domestic content. For instance, the Chevy Volt, which was identified by many commenters as being a car that is made in the United States, comprises only 40 percent United States and Canada content according to the window sticker

(http://www.cheersandgears.com/uploads/1298005091/med_gallery_51_113_449569.png

). There is no indication of how much of this 40 percent United States/Canadian content is United States-made content. Thus, the FHWA does not believe that application of a domestic content standard should be applied to the purchase of vehicles.

However, the FHWA believes that the vehicles should be assembled in the United States. Whenever a person discusses the manufacture of vehicles, the discussion typically refers to where the final assembly takes place. For instance, in the comments urging that the waiver be denied because the Chevy Volt is made in the United States, the FHWA interprets these comments as referring to the assembly of the vehicle in Detroit since the Volt window sticker says that the United States/Canada parts content of the vehicle is only 40 percent. While the manufacture of steel and iron products that are typically used in highway construction (such as pipe, rebar, struts, and beams) generally refers to the various processes that go into actually making the entire product, the manufacture of vehicles typically refers to where the vehicle is assembled. Thus, given the inherent differences in the type of products that are typically used in highway construction and vehicles, we feel that simply waiving the Buy America requirement, which is based on the domestic content of the product, without any regard to where the vehicle is assembled would diminish the purpose of the Buy America requirement.

Moreover, in today's economic environment with National unemployment rate over 9 percent, the Buy America requirement is especially significant in that it will ensure that Federal Highway Trust Fund (HTF) dollars are used to support and create jobs in the United States.

Therefore, while the FHWA has not located a vehicle that meets a 100 percent domestic iron and steel content requirement, the FHWA does not find that a complete waiver based on nonavailability pursuant to 23 U.S.C. 313(b)(2) is appropriate.

However, the FHWA also recognizes that at least a partial waiver is necessary in order to permit Alameda County to proceed with its project. In order to enable Alameda County to proceed with this project, the FHWA believes that a partial waiver that allows the County to purchase vehicles so long as the final assembly of the vehicle as the end product occurs in the United States is appropriate. This approach is similar to the standard in the provisions implementing the Buy American Act in the Federal Acquisition Regulations where "commercially available off-the-shelf" (COTS) items may be used if such items are manufactured in the United States. The general Buy American Act standard requiring the product to exceed 50 percent domestic content is waived for COTS items. This approach will also give effect to the FHWA's Buy America requirement by ensuring that HTF dollars are used to support American jobs in a reasonable and meaningful way.

In conclusion, and in light of the above, pursuant to 23 U.S.C. 313(b)(1), the FHWA finds that it is in the public interest to grant a partial waiver from the Buy America requirement at 23 U.S.C. 313(a) to purchase 79 electric sedans and 11 electric vans. Under this partial waiver, the general 100 percent domestic content requirement

that applies to Federal-aid highway projects shall not apply to the purchase of such vehicles. However, the final assembly of any vehicles purchased with HTF funds must occur in the United States.

In accordance with the provisions of section 117 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy of Users Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), the FHWA is providing this notice of its finding that a partial waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the automated batter switching mechanism waiver page noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110-161, 23 CFR 635.410)

Issued on: November 10, 2011

Victor M. Mendez
Administrator

[FR Doc. 2011-29976 Filed 11/18/2011 at
8:45 am; Publication Date: 11/21/2011]